(2)

No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et. al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the unilateral imposition of alcohol and drug testing by the Consolidated Rail Corporation against all crafts of railroad workers constitutes a "major" or "minor" dispute under the Railway Labor Act, where the railroad has a long established practice of requiring reasonable or particularized suspicion for detection and enforcement of the rule against alcohol or drug impairment.

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A. COUNTER-STATEMENT OF THE CASE

Prior to February 20, 1987, the Petitioner, Consolidated Rail Corporation (hereinafter "Conrail" or "the railroad"), had performed drug screening of employees under only limited circumstances. As the parties stipulated in the district court, Conrail, since its inception in 1976, has included a drug screen as part of the return to duty and periodic physical examination urinalyses of only certain employees. Drug screening was performed *only* when the returning employee had been taken out of service for a drug related problem, or, with respect to periodic examinations, when the examining physician had reason to believe that the employee may have been using drugs. (Resp. App. A-3).

In addition, all Conrail employees had been governed by the requirements of Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must make certain that such use will not affect the safe performance of their duties.

(Resp. App. A-1).

In enforcing this rule Conrail has always relied upon the supervisory observation of its employees; and, in the event that an employee was suspected of drug or alcohol abuse, that employee was required to submit to testing.

On July 29, 1985, the Federal Railroad Administration (hereinafter "FRA") promulgated 49 C.F.R. § 219 *et seq.*, which is entitled Control of Alcohol and Drug Use. This rule, which went into effect on February 10, 1986, requires toxicological testing of employees covered by the Hours of Service Act whenever specified train accidents or incidents occur, and authorizes testing based on reasonable suspicion for specific rule violations.[1] Since March 10, 1986, Conrail has required that all of its employees covered by the Hours of Service Act comply with the FRA's regulations.

On February 20, 1987, Conrail unilaterally decided to add drug screening to the urinalysis examination of all employees, including those as to whom Conrail has no particularized suspicion of drug use. The Respondents, Railway

[1] On June 6, 1988, the Court granted the Government's Petition for Writ of Certiorari to determine the constitutionality of the FRA's testing regulation. *Burnley* v. *Railway Labor Executives' Association*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988).

Labor Executives' Association (hereinafter "RLEA"), contend that this testing imposed by Conrail beyond that established by the FRA (49 C.F.R. § 219 *et seq.*) is a unilateral change in the rules and working conditions of the railroad, and, as such, constitutes a major dispute within § 152, Seventh, of the Railway Labor Act (hereinafter "RLA") (45 U.S.C. § 152, Seventh). The Petitioner claims that the testing creates a "minor" dispute under the RLA and is thus subject to the exclusive jurisdiction of the National Railroad Adjustment Board or other public law board. *See* 45 U.S.C. § 153.

Safety rules in the railroad industry are a critical element of working conditions and are thus subject to the provisions of § 2, Seventh, of the RLA (45 U.S.C. § 152, Seventh), which prohibit a carrier from making any unilateral change in working conditions except in the manner prescribed in the labor agreement or in § 6 of the RLA (45 U.S.C. § 156).

The Petitioner seeks to justify its unilateral imposition of drug screen tests as simply a refinement in its medical procedures, unrelated to the enforcement of Rule G, to reflect scientific advancement in the scope of urine testing. Initially, it is to be noted that Petitioner instituted the requirement for a drug screen urinalysis in the return-to-work and periodic physicals in February 1987, long after drug screen urinalysis was established as an accepted procedure. Inconsistently, Petitioner contends that the requirement for a drug screen urinalysis as part of the routine comprehensive physical examination was a long-standing requirement. (Pet. Br. 2-3, 8-9). This is misleading, because it fails to point out that the drug screen urinalysis was not a policy utilized until February 1987, at the earliest.

Furthermore, drug screening urinalysis tests are not just a refinement of existing medical procedure. Rather, the

implications of these tests, and the invasion of the employees' privacy which they entail, places them outside the purview of the routine medical examinations.

Petitioner's contention that the inclusion of urinalysis drug testing as an element in all physical examinations (including examinations upon return to work from furlough, leave or suspicion) is not an enforcement or surveillance procedure for Rule G is contradicted by the testimony of its representatives in the FRA rule-making proceedings. (Resp. App. A-5).

It is clear from these hearings that the Conrail witnesses felt the railroad needed authority to test. Mr. Herman Wells, Conrail's legal representative at the hearings, in response to questioning concerning the use of testing devices stated:

> "Mr. Wells: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks."

(Resp. App. A-7).

The industry testimony in the rule-making proceedings establishes beyond challenge that toxicological testing was viewed as a method for enforcement or surveillance of Rule G. This is clear from the testimony of Mr. A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads:

> Importantly, it is essential that the breath urinalysis and similar tests to be used and viewed as merely supplemental to existing methods of enforcing Rule G.

(Resp. App. A-13).

Although these referenced comments were made in the context of the breathalyzer tests, which was one of the several toxicological tests considered in the rule-making proceedings, they are pertinent to an understanding that the urinalysis drug screen represents a method for the enforcement and surveillance of Rule G. That these drug screening policies serve to enforce Rule G is further evidenced by the expansion of the policy to include FRA probable cause testing.

The combined effect of these changes constitutes a major change in working conditions and the rules relating thereto. It is clear we are not concerned here with an *interpretation* of the existing labor agreements and the established procedure thereunder but with a *change* in the established practice.

B. DECISIONS OF THE COURTS BELOW

Upon consideration of the parties' cross-motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania dismissed this case, brought by the RLEA, for lack of subject matter jurisdiction. The court held that the drug screen testing was a minor dispute under the RLA.

On appeal, the U. S. Court of Appeals for the Third Circuit reversed the District Court decision and remanded the case for further proceedings. In relating the history of the RLA, the court, Sloviter, J., noted that "minor" disputes were to be limited to "comparatively minor" problems, "representing specific maladjustments of a detailed or individual quality," 845 F.2d 1187, 1190 (3d Cir. 1988) (*quoting Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U.S. 711, 724 (1945)). The court concluded that Conrail's addition of drug screening to the urinalysis examinations of all employees "changes the terms and conditions governing the employment relationships" and therefore "constitutes a

major dispute which Conrail cannot impose unilaterally." *Id.* at 1194.[2]

C. REASONS FOR DENYING THE WRIT

This litigation does not involve any novel points of law that the Court has not already addressed. It arises under the RLA, 45 U.S.C. § 151 *et seq.* The specific issue is whether the actions of the Petitioner in implementing its drug testing policy constitute either a "major" or "minor" dispute under the RLA. This Court long ago set out the criteria for determining when a dispute is either "major" or "minor." *See Elgin, Joliet & Eastern Railway* v. *Burley,* 325 U.S. 711 (1945). *Detroit & Toledo Shore Line Railroad* v. *United Transportation Union,* 396 U.S. 142 (1969). The legal standards to be followed are well known and the Third Circuit Opinion correctly discusses such legal standards. (Pet. App. A-6 - A-10). In reaching its decision, the Third Circuit acknowledged that three other courts of appeal have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. (Pet. App. A-11). However, these cases can be distinguished based upon the specific facts of each case. (*see* Pet. App. A-11 - A-14). The Court during the last term denied a Petition for Certiorari in one of those cases whose issues were somewhat similar to the present case. *Chicago & NorthWestern Transportation Co.* v. *Brotherhood of Maintenance of Way Employees,* 827 F.2d 330 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 1291 (1988). So long as the lower courts apply the correct legal principle, it doesn't seem to be an appropriate function of this Court to review and reconcile the factual distinctions.

In any event, the Third Circuit decision is correct. For the Petitioner to argue that this case is a "minor" dispute

[2] The Third Circuit stayed its decision pending this Petition for a Writ of Certiorari.

defies reasonable logic. This case would reach constitutional proportions but for the fact that the testing is not mandated by a public agency. *See Burnley* v. *Railway Labor Executives' Association,* 839 F.2d 575 (9th Cir.), *cert. granted,* 108 S.Ct. 2033 (1988).

The U. S. Department of Transportation recognizes that railroads cannot unilaterally impose toxicological testing requirements on employees. This is clearly established in its comments in the rule-making proceedings relating to the promulgation of the Rules on Control of Alcohol and Drug Use for employees covered under the Hours of Service Act:

> Although the railroads clearly desire to prevent alcohol and drug-related accidents and have obvious incentives to do so, the policy of the Railway Labor Act, as construed in arbitration and in courts, severely limits the ability of management to implement new techniques to control the problem. FRA has previously described Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982), which blocked the attempt of a western railroad to institute random breath testing of employees by use of a portable device. The Board ruled that compulsory testing was not authorized by existing collective bargaining agreements and that requiring employees to submit to such testing was inconsistent with longstanding custom and practice under those agreements. The breadth of the language used in the award suggests that other, more limited programs of testing would also be deemed to offend the status quo policy of the Railway Labor Act, if implemented by unilateral action of management.

50 Fed. Reg. 31,528 (1985).

Furthermore, the General Counsel of the National Labor Relations Board has concluded that the "implementation of a drug testing program is a substantial change in working conditions, ..." Memorandum GC 87-5, *Daily Lab. Rep.* (BNA), D-1 (Sept. 24, 1987). The Memorandum states that drug testing is a mandatory subject of bargaining under the National Labor Relations Act ("NRLA").

The General Counsel's reasoning is that there is a substantial change in working conditions inherent in drug testing as compared with traditional physicals examinations. As stated in the Memorandum:

> . . . the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work a drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform work. In addition, it is our view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broke. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is 'a material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally.'

The standard for the requirement of collective bargaining following substantial changes in working conditions is an element of both the NLRA and the RLA. Accordingly, the railroad's argument relative to the implementation of drug testing flies directly in the fact of the established and accepted principles governing such tests.

The Court has a similar Petition for Certiorari pending in *Burlington Northern Railroad* v. *Brotherhood of Locomotive Engineers*, 838 F.2d 1087 (9th Cir. 1988) *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631). The facts in that case and the present one are related but are not exactly the same (*see* Pet. App. A-11 - A-12). However, the ultimate issue of whether each railroad unilaterally changed the working conditions and thus did not comply with the Railway Labor Act is the same. In view of the similarities in the two pending cases, the Court may wish to defer action here until it determines whether to grant certiorari in the *Burlington Northern Railroad* case.

Finally, the appropriate forum for Petitioner should be Congress, not this Court to redress its rights (or lack thereof) under the RLA. Congress is actively considering legislation which would clarify the rights and obligations of railroads in conducting toxicological testing. *See* H.R. 4748, 100th Cong., 2d Sess. (1988); H.R. 3051, 100th Cong., 1st Sess. (1987); S. 1041, 100th Cong., 1st Sess. (1987).[3] It would save everyone time and effort to await anticipated

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[3] The latter two bills concern random testing in the railroad industry, but H.R. 4748 covers all types of testing, including the tests being performed by the Petitioner.

Congressional action on this issue. The legislation will likely make the pending litigation moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., *Plaintiffs,* v. CONSOLIDATED RAIL CORPORATION, *Defendant.*	CIVIL ACTION NO. 86-2698

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2) encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough, leave, suspension or similar causes to undergo physical examinations

upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

/s/ Joseph J. Costello

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Approved and So Ordered this day of , 1987.

U.S.D.C.J.

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

IN RE:

CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING

Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th & C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:

THOMAS A. TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

be doing later on when he's in a much larger and more dangerous vehicle, in other words he has a great deal more responsibility for the public at one time.

MR. TILL: Are there any questions from the audience? If not, thank you very much for your testimony and your appearance here today and for the information that you provided.

MS. NATHANSON: Thank you.

MR. TILL: The next witness is Mr. Don Swanson, the Vice President of Operations of Consolidated Rail Corporation, accompanied by a panel.

MR. SWANSON: Thank you, Mr. Chairman, members of the panel. I'm Donald Swanson, Vice President — Transportation of the Consolidated Rail Corporation.

Accompanying me are Mr. Herman Wells, our legal representative and John Gorman, our Manager of Employee Assistance.

On behalf of Conrail, I want to express appreciation for this opportunity to contribute information and views for

resolving the problem of alcohol and drug use in the railroad industry.

My own department has a major part of the responsibility for promoting safety by working.

MR. MASON: You mean mandatory by FRA?

MR. WELLS: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks. But we would not like a requirement by the FRA that we should use them in all cases.

MR. MASON: In principle then, you do not think that occasional random use of the breath testing device — assuming the proper safeguards — is in and of itself warranted — — —

MR. WELLS: No, it would be useful deterrent.

MR. MASON: But to clear that up, do you believe that at some point unregulated, overzealous use of a testing device on a random basis could reach a level of operation that would be inappropriate?

MR. WELLS: It might.

MR. MASON: Thank you, that's all I have.

MR. TILL: Are there any further questions from the audience? Mr. Cothen?

MR. COTHEN: Does Conrail require any annual physicals?

MR. SWANSON: Yes, it does.

MR. COTHEN: Are they performed by private physicians?

MR. SWANSON: In some cases — well, they're performed in some cases by private physicians under contract with Conrail.

MR. COTHEN: Are the physicians asked to do a drug screen of —

MR. SWANSON: No, they are not.

MR. COTHEN: Have you considered it?

MR. SWANSON: Not that I'm aware of.

MR. COTHEN: Would it present any — obstacles?

MR. SWANSON: Not to my knowledge, no.

MR. TILL: Thank you, Mr. Swanson. The next witness is Mr. William Johnston of the Association of American Railroads, accompanied by Mr. Hollis Duensing.

MR. DUENSING: Mr. Till, I apologize for not having extra statements of Mr. Johnston here with us today.

As you know, we were scheduled to appear tomorrow and in view of previous comments that you — indicating that you'd like to hear us today, we must proceed on the basis of our draft statement. And I have an extra copy which I can either give to the panel or to the reporter, whichever you wish.

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

IN RE:

CONTROL OF ALCOHOL AND DRUG USE

IN RAILROAD OPERATION

ADVANCE NOTICE OF PROPOSED RULEMAKING

Docket No. RSOR-6

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BEFORE PANEL MEMBER:

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JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

BEFORE THE

UNITED STATES

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

CONTROL OF ALCOHOL AND DRUG ABUSE IN RAILROAD OPERATIONS
FRA DOCKET NO. RSOR-6, NOTICE NO. 1

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

My name is A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads.

The nation's railroads are committed to the strong and effective enforcement of the existing prohibitions against the use of alcohol and drugs and the possibility of employees performing duties when under the influence of alcohol or drugs. Both management and labor have devoted substantial resources in attacking this issue internally within each

railroad. Unfortunately, public perception of the railroad's success in enforcing its regulations is formed by nonrailroad sources. Public attention to the issue of drug and alcohol abuse enforcement is beneficial to the extent it motivates reasonable private and public action but detrimental to the extent it creates the impression that nothing is being done or that railroads are lax in enforcing their rules.

person's sense of fairness and reasonableness nor is there any outcry against such public use as being an unreasonable invasion of the motorist's right to privacy. In the case of railroad employees engaged in duties directly affecting public safety, the issue is not an abstract matter of the right to privacy — it is a question of public safety. Railroad employees do not have a right to privacy which rises above public interest in safety.

The railroads should be free to use state-of-the-art testing devices on a selective basis. A railroad should have the ability to expend its resources in an efficient manner and thus could pinpoint specific problem locations on an unannounced spot basis. Unless the railroad has the ability to set

the criteria for use of such devices it may be deprived of the ability to use the devices in a manner which effectively deters Rule G violations. Because of existing grievance procedures, there is very little chance that tests will be administered in an unreasonable manner.

Importantly, it is essential that the breath analysis test and similar tests be used and viewed as merely supplemental to existing methods of enforcing Rule G. The traditional methods of determining Rule G violations — incoherent speech, slurring, unsteady gait, smell of alcohol, etc. — will still be relied upon and serve as the basis for disciplinary action for Rule G violations.

In addition to using state-of-the-art testing devices on a controlled random basis, the railroads will be free to use them in